

### REMARKS

Applicants respectfully request entry of the amendments and remarks submitted herein. Claim 11 has been amended herein, and claim 19 has been canceled without prejudice to continued prosecution. No new matter has been added herein.

Claims 10-13, 20 and 21 are currently pending. Reconsideration of the pending application is respectfully requested.

#### The 35 U.S.C. §112 Rejections

Claims 11 and 12 stand rejected under 35 U.S.C. §112, first paragraph, as the Examiner asserted that those claims fail to comply with the written description requirement. According to the Examiner, the limitation “said completed mix is a layer on, under and/or around the meat, fish, poultry, seafood, rice, potato, dairy products, fruits and/or vegetables” in claim 1 constitutes new matter.

Without acquiescing to the Examiners rejection, claim 11 has been amended herein to use language that more closely reflects the language used in paragraph [0121] (of the published application, US 2006/0275535). As amended, claims 11 and 12 have support in the originally filed application. Therefore, in view of the amendments and remarks herein, Applicants respectfully request that the rejection of claims 11 and 12 under 35 U.S.C. §112, first paragraph, be withdrawn.

Claim 12 stands rejected under 35 U.S.C. §112, second paragraph, as the Examiner asserted that claim 12 is indefinite for failing to particularly point out and distinctly claim the subject matter that Applicant regards as the invention. According to the Examiner, the previous amendments to claim 11 render claim 12 indefinite.

As indicated above, claim 11 has been amended herein to more closely reflect the language from the specification. As amended, claim 11 requires that the food composition (e.g., snacks, pies, pizza-like products, savoury filled products, sweet bakery products) is a layer on, under and/or around the completed mix. In view of the amendments to claim 11, claim 12 is not

indefinite. Therefore, in view of the amendments and remarks herein, Applicants respectfully request that the rejection of claim 12 under 35 U.S.C. §112, second paragraph, be withdrawn.

#### The 35 U.S.C. §102 Rejections / §103 Rejections

Claim 19 stands rejected under 35 U.S.C. §102(b) as anticipated by, or, in the alternative, under 35 U.S.C. §103(a) as obvious over, Henckel (GB 1294426). The Examiner alleged that Henckel meets all of the limitations of the pending claims.

Without acquiescing to the Examiner's rejection and solely to expedite prosecution of the remaining claims, claim 19 has been canceled herein without prejudice to continued prosecution. Accordingly, Applicants respectfully submit that the rejection of claim 19 under 35 U.S.C. §102(b) or, in the alternative, under 35 U.S.C. §103(a), is moot.

#### The 35 U.S.C. §103 Rejections

Claims 10-13 and 19-21 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Fazzina et al. (U.S. Patent No. 3,852,501) in view of Suderman (U.S. Patent No. 4,588,600), further in view of Evans et al. (U.S. Patent No. 4,208,442), and further in view of Kettlitz (U.S. Patent No. 6,235,894), all previously made of record. This rejection is respectfully traversed.

The pending claims are directed toward food compositions that include a dry mix, where the dry mix contains certain ingredients and has very particular properties such as baking stability (e.g., will not increase in volume or be deformed upon baking or frying), freeze-thaw stability and stable viscosity. A person skilled in the art looking for a dry or complete mix that can serve as a multipurpose filling and that exhibits the claimed features, would not look to any of the references cited by the Examiner. This is primarily because each of the cited references is intended to solve a problem that is unrelated to that addressed by the present disclosure.

For example, Fazzina et al., Suderman, and Evans et al. each disclose a dry mix that can be used to give baked products (in the case of Evans et al., a fowl) the taste, texture and appearance of a fried product (see, for example, the Abstract in each reference). Significantly, the background section of Suderman addresses both Fazzina et al. and Evans et al., indicating that both Fazzina et al. and Evans et al. are in the same field as Suderman, and that Suderman

improves upon problems previously addressed by Fazzina et al. and Evans et al. (see column 3, lines 7-26 of Suderman). Also significantly, Suderman states that dry mixes for coating baked food products (to give them the appearance of a fried product) are not suitable for use in cakes or other products where a soft texture is needed (see, for example, column 1, lines 49-58). Thus, Suderman teaches away from using their dry mix as well as the dry mixes of Fazzina et al. and Evans et al. for any food product having a soft texture such as, for example, the claimed fillings and spreads.

Kettlitz, on the other hand, discloses methods of making heat stable high viscosity starches by reacting high viscosity starch with activated chlorine (see, for example, the Abstract). Kettlitz does not disclose or suggest the claimed dry mix having the particularly claimed features, and the combination of Kettlitz with Fazzina et al., Suderman, and Evans et al. also does not result in the claimed dry mix having the particularly claimed features. Therefore, the combination of cited references does not disclose the claimed food compositions.

It is only with hindsight in view of the present specification that the claimed invention would be seen as obvious. The *KSR* Court, quoting *Graham* (383 U.S., at 36), stated that the "Supreme Court has 'warn[ed] against 'temptation to read into the prior art the teachings of the invention in issue' and instruct[ed] courts to 'guard against slipping into the use of hindsight'." (*KSR International Co. v. Teleflex Inc.*, 127 S. Ct. at 1742 (2007)). In addition, an invention is not obvious merely because the prior art could be modified. *In re Gordon*, 221 USPQ 1125, 1127 (Fed. Cir. 1984). Instead, the prior art, as a whole, must fairly suggest the desirability to make the invention. *Id.*

The pending claims are directed toward food compositions that include a dry mix comprising gluten, starch hydrolysates, flour, stabilized starch n-octenyl succinate and fat in particular amounts that result in very particular properties (e.g., baking stability, viscosity, and freeze-thaw stability). As indicated herein, the claimed dry mix can be used for baking, as a spread (i.e., non-cooked), or as a filling, for example. Since none of the cited references, alone or in combination, discloses the claimed dry mix having the claimed properties, the pending claims are not obvious. In view of the remarks herein, Applicants respectfully request that the rejection of claims 10-13 and 19-21 under 35 U.S.C. §103(a) be withdrawn.

Claims 10-13 and 19-21 stand rejected under 35 U.S.C. §103(a) as being unpatentable over Gambino et al. (U.S. Patent Application No. 2002/0039612) in view of McGlynn et al. (U.S. Patent Number 6,322,829), further in view of Barry et al. (U.S. Patent Number 4,919,947) and further in view of Kettlitz et al. (U.S. Patent Number 6,235,894), previously cited by the Examiner. This rejection is respectfully traversed.

Gambino discloses a waffle that includes a filling, which was specifically developed to overcome problems with the heating (e.g., toasting) of frozen waffles (see, for example, the Abstract). The filling of Gambino includes 35-80% sweeteners, 0-8% starch, 0-8% fat, 0-10% protein (see, for example, page 3, Table 1). Significantly, to arrive at the recited amounts for the claimed dry mix, a skilled person would need to add fat and protein to the composition of Gambino. The Examiner has not explained what the motivation would be for a skilled person to add fat to the composition of Gambino.

In addition, Gambino discloses a number of different proteins, only one of which is gluten (see, for example, paragraph [0036]). However, as the Examiner admitted, Gambino does not disclose Applicants' claimed amounts (OA at page 16). Therefore, the Examiner asserted that one skilled in the art would use the amount of protein as taught by McGlynn (OA at page 17). However, McGlynn discloses that their preferred protein, in addition to the cheese base, is dairy protein (see, for example, column 5, lines 33-49); McGlynn does not even mention gluten. After the already unusual combination of Gambino with McGlynn, the Examiner alleged that a skilled person would then turn to Barry and, from Barry, select milled flour from a number of different "solid extenders" (e.g., maltodextrins, pregelatinized and other modified starches, cellulose powder, milled flour; see, for example, column 4, lines 5-8).

Applicants respectfully submit that this is a classic case of hindsight, which is still improper. The *KSR* Court, quoting *Graham* (383 U.S., at 36), stated that the "Supreme Court has 'warn[ed] against 'temptation to read into the prior art the teachings of the invention in issue' and instruct[ed] courts to 'guard against slipping into the use of hindsight'." (*KSR International Co. v. Teleflex Inc.*, 127 S. Ct., at 1742 (2007)). In addition, the *KSR* Court stated that a "factfinder should be aware, of course, of the distortion caused by hindsight bias and must be cautious of arguments reliant upon *ex post* reasoning." (*KSR* at 1742). Simply because each of the ingredients in the claimed dry mix can be found in the identified references does not mean

Applicant : Frans Johan Sarneel et al.  
Serial No. : 10/550,936  
Filed : September 28, 2005  
Page : 10 of 10

Attorney's Docket No.: 19790-0003US1 / CER03-0009

that the particularly claimed amounts, which result in the particularly claimed properties, are obvious.

In view of the remarks herein, Applicants respectfully request that the rejection of claims 10-13 and 19-21 under 35 U.S.C. §103(a) be withdrawn.

### CONCLUSION

Applicants respectfully request allowance of claims 10-13, 20 and 21. If a telephone call to the undersigned would expedite prosecution, the Examiner is encouraged to do so. Please apply the fee for the enclosed Petition for Extension of Time and any other charges or credits to Deposit Account No. 06-1050.

Respectfully submitted,

/May 23, 2011/

/M. Angela Parsons/

Date: \_\_\_\_\_

\_\_\_\_\_  
M. Angela Parsons, Ph.D.  
Reg. No. 44,282

Customer Number 26191  
Fish & Richardson P.C.  
Telephone: (612) 335-5070  
Facsimile: (877) 769-7945